

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN SCHWARTZ
Claimant

VS.

KELLY MACLASKEY OILFIELD SERVICES, INC.
Respondent

AND

**USF&G
COMMERCIAL UNION INSURANCE COMPANY**
Insurance Carriers

AND

WORKERS COMPENSATION FUND

Docket No. 177,119

ORDER

Both the Kansas Workers Compensation Fund and respondent and USF&G, one of the insurance carriers, have filed an Application for Review requesting Appeals Board review of a Nunc Pro Tunc Award entered by Administrative Law Judge Bruce E. Moore on November 3, 1995. The Appeals Board heard oral argument by telephone conference on March 5, 1996.

APPEARANCES

Claimant appeared by his attorney, Julie A. Bedinghaus of Great Bend, Kansas. Respondent and its insurance carrier, USF&G, appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas. Respondent and its insurance carrier, Commercial Union Insurance Company, appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John Carpenter appearing for Gail Carpenter of Great Bend, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations entered in the November 3, 1995 Nunc Pro Tunc Award.

ISSUES

The Kansas Workers Compensation Fund (Fund) raised the following issues on appeal:

- (1) The nature and extent of claimant's disability; and
- (2) The liability of the Fund.

In addition, respondent and USF&G, requests review of the following issues:

- (3) The liability of USF&G; and
- (4) What is the date claimant suffered an accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Appeals Board commences a review of this case, an issue that was raised before the Administrative Law Judge and not addressed in the Nunc Pro Tunc Award needs to be discussed. The claimant originally filed his Application for Hearing on May 12, 1993. The Application claimed a date of accident as: "Approx. April 2, 1992 and October, 1992." Claimant's accident was described in the Application as: "Gauging a tank when he slipped and fell on tank walkway." After all the evidence had been taken in this case and after the terminal dates of both the claimant and the respondent had elapsed, the claimant on July 27, 1995 filed an Amended Application for Hearing. The Amended Application claimed a date of accident as: "From April 2, 1992 to October 1992 and all micro-traumas each and every day thereafter from employment with respondent after 4-2-92." The claimant's accident was described in the Application as: "Gauging a tank when he slipped and fell on tank walkway; micro-traumas from prolonged driving activities with respondent."

Respondent through its insurance carrier, Commercial Union Insurance Company, specifically objected to claimant's Amended Application for Hearing in its submission letter dated October 6, 1995. Commercial Union further argued that the Amended Application should not be allowed because the claimant had changed dates of accident. Commercial Union contended that all parties were prejudiced because of this change as the case was tried and evidence was presented only in reference to the originally pleaded dates of accident of April 2, 1992 and October 1992. Commercial Union further argued that to allow a change in the date of accident at this stage in the proceedings would create numerous questions concerning, e.g., issues of notice and timely written claim.

Administrative Law Judge Bruce E. Moore in his Nunc Pro Tunc Award did not address the objection to claimant's Amended Application for Hearing. After reviewing the whole evidentiary record and considering the briefs of the parties, the Appeals Board finds that before a review of this case can be completed by the Appeals Board, the issue of whether the Amended Application for Hearing filed by the claimant that changed the date of accident in this matter should be allowed has to be addressed. Accordingly, the Appeals Board remands this case to Administrative Law Judge Bruce E. Moore to conduct a hearing whereby all parties may present argument on this issue. The Appeals Board also finds that if the claimant is permitted to amend his Application for Hearing, the question of whether it is necessary to reopen the evidentiary record to allow all parties to present additional evidence on the new dates of accident should also be considered.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Nunc Pro Tunc Award of Administrative Law Judge Bruce E. Moore dated November 3, 1995, should be, and hereby is, remanded for further proceedings consistent with the above findings.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Julie A. Bedinghaus, Great Bend, KS
Richard L. Friedeman, Great Bend, KS
Kendall R. Cunningham, Wichita, KS
Gail Carpenter, Great Bend, KS
, Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director